
(2019) 05 GAU CK 0097

In the Gauhati High Court

Case No : Motor Accident Appeal No. 123 Of 2015

Md. Sajahan Ali

APPELLANT

Vs

Bajal Allianz General Insurance Co. Ltd. And Anr

RESPONDENT

Date of Decision : 24-05-2019

Acts Referred:

Motor Vehicles Act, 1988 — Section 166

Citation : (2019) 05 GAU CK 0097

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : A Dutta, B J Mukherjeer

Final Decision : Disposed Off

Judgement

1. Heard Mr. A. Ganguly, the learned counsel for the appellant and Mr. B.J. Mukherjee, the learned counsel for the respondent No. 1. The respondent No. 2 was struck off from the arrayed respondent vide Order dated 01.04.2016. The appeal is therefore taken up for final disposal by hearing the appellant as well as the respondent No. 1.

2. This appeal is filed by the claimant seeking enhancement of the Court passed by the learned Member, Motor Accident Claims Tribunal, Sonitpur, Tezpur in MAC Case No. 249/2009 on 20.12.2014 whereby, a sum of Rs. 2,24,100/- was awarded to the claimant for the injuries sustained by him in a road accident on 28.02.2009.

3. Brief fact of the case is that on that fateful day at about 5:00 P.M, while the claimant was proceeding with his friend in a Motor Cycle bearing Registration No. AS-12-4854, one vehicle (Santro Car) bearing Registration No. AS-03 H-0754, which was coming from the opposite direction and being driven in a rash and negligent manner, knocked them down. As a result, the rider of the Motor Cycle expired and the claimant sustained grievous injuries. The claimant was taken to Kanaklata Civil Hospital, Tezpur and thereafter to GMC Hospital, Guwahati. Later

on, he undertook treatment at Patna, Bihar.

4. The claimant therefore filed a claim application before the Tribunal under Section 166 of the Motor Vehicles Act, 1988 (MV Act), claiming a sum of Rs. 14,21,000/- as compensation from the respondents arrayed therein. The respondent No. 1 being the insurer of the Santro Car was arrayed as the OP-3 while the owner and the driver of the Santro Car was arrayed as respondent Nos. 1 & 2 respectively. In order to establish his claim, the claimant examined himself as the lone claimant witness while the OP-1/respondent No. 1 did not examine any witness. The Tribunal proceeded ex parte against the OP-1 & 2, since they failed to appear before the Tribunal. Consequently, the Tribunal vide Judgment dated 20.12.2014 awarded compensation to the claimant as already stated herein above. However, not being satisfied with the same, the claimant is before this Court in appeal.

5. Mr. A. Ganguly, the learned counsel for the appellant submits that as per the Disability Certificate issued to the claimant by the authority concerned and which was exhibited as Exhibit-19, the percentage of disability of the appellant was 50%, which included both the functional as well as disability assessment. Although the Disability Certificate was proved in original and accepted by the Tribunal, the Tribunal assessed the percentage of loss of earning functional disability of the claimant by adopting less work at 10%. He submits that considering the nature of the injuries suffered by the claimant as well as the percentage of his overall disability, the percentage arrived at by the Tribunal towards functional disability is only on the lower side apart from the same being without any basis.

6. Mr. A. Ganguly, the learned counsel further submits that the Tribunal failed to award any compensation towards future medical treatment. He submits that considering the advice given by the Orthopedic Surgeon in the Discharged Summary exhibited as Exhibit-18, which is to the effect that the claimant would require physiotherapy, paraffin wax bath exercises besides to the medications, the Tribunal ought to have awarded a reasonable amount for his future medical treatment. In so far as the monthly income of the claimant is concerned, the Tribunal by fixing his notional income for Rs. 3,000/- per month is too less an amount inasmuch as the claimant was aged about 26 years at the relevant time and he was in the business of Paint Hardware. Although the claimant has not specifically produced an Income Certificate, the Tribunal considering the facts and circumstances ought to have taken at least Rs. 7,000/-, if not, any amount above Rs. 3,000/- per month as the notional income of the claimant.

7. Mr. A. Ganguly, the learned counsel by referring to the case of R.D. Hattangadi Vs. Pest Control (India) Pvt. Ltd. and Others reported in (1995)1 SCC 551 submits that the Tribunal considering the injuries sustained by the claimant and also his age ought to have awarded non pecuniary damages at least under two heads, i.e., (i) damages to compensate for the loss of amenities of life which may include a variety of matters i.e., not being able to walk, run or sit on account of

the injuries (ii) inconvenience, hardship, discomfort, disappointment, frustration and mental stress in life. Therefore, in view of the law laid down by the Apex Court in R.D. Hattangadi (Supra), the award of the Tribunal is liable to be suitably enhanced. The learned counsel also submits that the rate of interest i.e., @ Rs. 7.5% per annum as awarded by the Tribunal is only on the lower side. He submits that the accident occurred on 28.02.2009 whereafter, a certificate of his permanent disability was issued to the claimant on 27.01.2010 and the final Judgment & Award having been passed only on 20.12.2014, the Tribunal ought to have awarded at least 9% per annum as interest. In this connection, he relies upon the Apex Court decision rendered in *Supre De (Smt) and Others Vs. National Insurance Company Limited* and Another reported in (2009) 4 SCC 513. He thus submits that under the facts and circumstances, the claimant/appellant having made out a case, Court may suitably enhance the compensation to be paid to him.

8. Mr. B.J. Mukherjee, the learned counsel appearing for the respondent No. 1 submits that the appellant may have been given a Disability Certificate certifying that he was 50% disabled but however, such percentage cannot be taken as the functional disability of the appellant. Considering the nature of the injury and disability, the Tribunal would be required to work out the actual functional disability of the appellant and in the present case, 10% was worked out and which in fact, only appears to be on the higher side. He submits that going by the Discharged Summary given to the appellant by the Orthopedic Surgeon concerned and which was exhibited as Exhibit-18 by the appellant, the condition of the appellant was found to be improved considerably and the fracture was also in the process of union. Therefore, the Discharged Summary itself would go to show that the appellant would not require further medical treatment. The Tribunal therefore was justified in not awarding any compensation towards future medical treatment to the appellant.

9. The learned counsel further submits that in support of his claim that he was having a monthly income of about Rs. 7,000/-, the appellant did not produce any document nor did he lead any evidence in this regard. Therefore, the basis of his claim that he was earning Rs. 7,000/- per month having no proof, the notional income adopted by the Tribunal the sum of Rs. 3,000/- per month also appears to be on the higher side. Besides this, the Tribunal also excessively added 50% of his monthly income towards his future prospects. He submits that a Constitution Bench of the Apex Court in *National Insurance Company Vs. Pranay Sethi & Others* reported in (2016) 17 SCC 680 held that in a case where the claimant was self employed and within the age upto 40 years, 40% was found to be appropriate for calculation of the future prospects of the claimant. Therefore, the Tribunal award appears to be on the higher side.

10. Mr. B.J. Mukherjee, the learned counsel finally submits that fixation of the rate of interest is never mandated by the Apex Court. The same has to be considered and fixed as per the prevailing Bank interest rates. The Tribunal in

fixing the rate of interest at 7.5% per annum in view of the Bank interest at the relevant time cannot be said to have awarded a low interest rate. Under the circumstance, he submits that the appellant cannot be said to have any legitimate grievance against the Judgment & Award and as such, the appeal be dismissed.

11. Making a quick reply, Mr. A. Ganguly, the learned counsel for the appellant submits that the respondent No. 1 did not file any cross appeal nor cross objection and therefore, cannot be permitted to raise such objections. He submits that the Apex Court in *Pranay Sethi & Others (Supra)* did not distinguish between the notional income and the establish income of the claimant and therefore, the Tribunal did not committed any error in awarding 50% towards future prospects. In so far as the rate of interest is concerned, he submits that not only is the interest on saving account but also the loan interest rates of the Bank is required to be considered to arrive at the appropriate figure. Therefore, the interest @ 9% per annum, considering the facts and circumstances as well as the case of *Supe Dei and Others (Supra)* is only appropriate.

12. I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record.

13. The issue to be considered from the case projected by the appellant is as to whether the amount of compensation awarded by the Tribunal should be enhanced under the facts and circumstances of the case. As may be seen on account of the accident, the appellant suffered grievous injuries and had to undergo medical treatment. Exhibit-18 is the Discharged Summary of the appellant issued by the Orthopedic Surgeon, who gives him treatment. Exhibit-19 is the Disability Certificate issued to the appellant by the District Social Welfare Officer, Sonitpur, Tezpur certifying the nature of disability of the appellant as "Post Traumatic Post Operative Deformity and Disability of Lower Limbs @ 50%". Considering the nature of the injury and the percentage of disability of the appellant, the Tribunal was of the view that the percentage of the loss of earning capacity can be assessed as 10%.

14. The Apex Court in the case of *Raj Kumar Vs. Ajay Kumar & Another* reported in (2011) 1 SCC 343 held that permanent disability and functional disability are two different things. The percentage of permanent disability cannot be applied as the functional disability of the injured person. The loss of earning capacity of the injured person as a result of the accident will be the relevant factor which corresponds to functional disability. Therefore, in the given case, the Apex Court considering the fact that the percentage of permanent disability of the claimant being 45%, his future earning capacity was assessed as 20%. In the present case as well, following the ratio of *Raj Kumar (Supra)* and considering the injury sustained by the appellant, I am of the view that the loss of future earning capacity or functional disability of the appellant as assessed by the Tribunal is on the lower side and as such, the same should be enhanced to 20%.

15. In so far as the income of the appellant is concerned, he has not led any evidence to prove that he was earning a sum of Rs. 7,000/- as claimed by him before the Tribunal. Therefore, the notional income @ Rs. 3,000/- per month as fixed by the Tribunal is found to be appropriate. With regard to the non-pecuniary loss suffered by the appellant, the Tribunal awarded a sum of Rs. 50,000/- towards pain, shock and suffering. However, no compensation was awarded under the head "loss of amenities of life". The Apex Court in the case of R.D. Hattangadi (Supra) in the given facts and circumstances of the case awarded a sum of Rs. 1,50,000/- each towards the two heads namely "pain and suffering" and "loss of amenities of life". It may be noticed that the percentage of disability in that case was 100% compared to 50% disability in the present case. Therefore, following the ratio, I am of the considered opinion that the appellant should be awarded a sum of Rs. 75,000/- each under the two aforementioned heads.

16. Furthermore, it is also noticed in the Discharged Summary of the appellant that he was advised to undergo physiotherapy for mobilization. Considering the same and also the nature of the injury sustained by the appellant, I am of the view that ends of justice would be met if a sum of Rs. 30,000/- is added to the award towards physiotherapy treatment.

17. In respect of the other breakups of the award made by the Tribunal including the rate of interest, the same is found to be justified and therefore, should be maintained. In the result, the appellant will be entitled to compensation as follows:-

(1)

Medical expenses

= Rs. 58,300/

(2)

Incidental expenses

= Rs. 15,000/

(3)

Loss of income

= Rs. 9,000/

(4)

Loss of future earning

= Rs. 4,200 x 12 x 17 x 20% = Rs. 1,71,360/

(5)

Towards pain and suffering

= Rs. 75,000/

(6)

Towards loss of amenities of life

= Rs. 75,000/

(7)

For physiotherapy

= Rs. 30,000/

Total

= Rs. 4,33,660/

(Rupees Four Lakhs Thirty Three Thousand Six Hundred Sixty) only.

The appellant thus will be entitled to a sum of Rs. 4,33,660/- (Rupees Four Lakhs Thirty Three Thousand Six Hundred Sixty) only along with interest @ 7.5% w.e.f. the date of filing the claim application i.e., 10.07.2009 till final payment. The amount of compensation shall be deposited by the respondent No. 1 Insurance Company before the Registry of this Court within a period of 2 (two) months from the date of receipt of the certified copy of this order. The deposited amount may be withdrawn by the appellant/claimant on proper identification and as per usual formalities.

18. It is also made clear that the amount already paid to the appellant if any shall be adjusted from the final amount to be paid along with the interest.

19. The appeal accordingly stands disposed of.

20. Registry to send back the LCR to the Tribunal immediately.